83-44

No. .....

SUPREME COURT
FILED
JUL 12 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

SOLON BAPTIST TEMPLE, INC.,
an Ohio non-profit corporation,

Petitioner,

vs.

THE CITY OF SOLON, a municipal corporation;
ARTHUR D. KORKOWSKI, in his capacity as Building Commissioner for the City of Solon;
and FRANK G. ZUGAN, in his capacity as Inspector for the Fire Prevention Bureau of the City of Solon,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO

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QUESTIONS PRESENTED

1. Whether the raising of the defense of qualified immunity by municipal officials in an action based upon 42 U. S. C. Sec. 1983 brought by a church against a municipal corporation and such officials presents material fact issues which cannot be appropriately addressed under pre-trial motion procedures.

2. Whether a pleading, which must demonstrate the fulfillment of certain statutory requirements by the complainant, is to be strictly construed and not extended beyond its clear expression when subject matter jurisdiction is dependent upon such fulfillment.

3. Whether a building permit applicant has the right to be notified by the issuing agency of an adverse adjudication order when administrative appeal procedures are available to such applicant.

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THE CITY OF SOLON, a municipal corporation;
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and FRANK G. ZUGAN, in his capacity as Inspector for the Fire Prevention Bureau of the City of Solon,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT, CUYAHOGA COUNTY, OHIO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

SOLON BAPTIST TEMPLE, INC., the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio, entered in the above mentioned case on December 23, 1982. Petitioner's Motion requesting the Supreme Court of Ohio to direct the Court of Appeals for Cuyahoga County to certify its Record was overruled on April 13, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio, in *The City of Solon, et al v. Solon Baptist Temple, Inc.*, is unreported but is printed in Appendix B hereto, at APP. 3, *infra*. The journal entry of the Court of Common Pleas for Cuyahoga County is unreported but is printed in Appendix C hereto, *infra*, at APP. 16.

—o—

JURISDICTION

The judgment of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio (Appendix B, *infra*, at APP. 3) was entered on December 23, 1982. The Supreme Court of Ohio overruled Petitioner's Motion for an Order Directing the Court of Appeals for Cuyahoga County to certify its Record on April 13, 1983. Appendix A, *infra*, at APP. 1. The jurisdiction of the Supreme Court is invoked under 28 U. S. C. Sec. 1257(3).

—o—

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution, and the Ohio Revised Code are involved in the questions presented:

First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment:

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. Sec. 1983—Civil action for deprivation of rights. APP. 18.

Ohio Revised Code, Sec. 119.06—Adjudication order of agency valid and effective; hearings; periodic registration of licenses. APP. 18.

Ohio Revised Code, Sec. 119.12—Appeal by party adversely affected. APP. 20.

Ohio Revised Code, Sec. 3781.031—Issuance of adjudication orders and stop work orders. APP. 25.

Ohio Revised Code, Sec. 3781.15—Injunction proceedings. APP. 27.

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STATEMENT OF THE CASE

Solon Baptist Temple, Inc., Petitioner herein, is located in the City of Solon, State of Ohio and is lawfully established under applicable laws of the State. It is an independent, fundamental church operating various ministries with Rev. Marion Wojnarowski as Pastor.

In July of 1978, Solon Baptist purchased an existing single family residential home located in the City, began to conduct religious services therein and provide maintenance and repairs. Subsequent thereto, Rev. Wojnarowski was informed by Arthur Korkowski, Building Commissioner, that the Petitioner would have to obtain a permit before making structural alterations. Accordingly, the Church made application for a permit by providing the Commissioner with a set of blueprints with notations thereon indicating such alterations.

On or about September 2, 1978, Mr. Korkowski and Frank G. Zugan, Fire Inspector, came to the Church returning the blueprints and holding a purported list of code violations. Mr. Korkowski stated in deposition that he had placed a red tag on the structure and, although this was not the usual procedure utilized, intended the tag to be considered a stop-work order against the Church. Rev. Wojnarowski stated in his deposition that Solon Baptist had never received nor been informed of such an order.

Concurrent with the above, Solon Baptist and Rev. Wojnarowski began to be systematically harrassed by Respondents through their policies and conduct which effectively tainted all contact between Church members and city officials and the community as a whole. As a result of such harrassment, church membership and attendance was hindered resulting in spiritual deterioration of the congregation as well as financial problems.

The Respondents filed a Complaint for Mandatory and Permanent Injunction under Sec. 3781.15 of the Ohio Revised Code on September 8, 1978. APP. 27. The Com-

plaint alleged that Solon Baptist's structure was in violation of applicable building standards of the Ohio Revised Code and the Solon Fire Prevention Code thus making it, purportedly, a public nuisance.

Solon Baptist duly filed an Answer and also a Counterclaim against Respondents, the latter based upon 42 U. S. C. § 1983. The Counterclaim alleged, among other things, as follows at paragraph No. 9 thereof:

> 9. Plaintiffs have systematically, by infliction of extreme duress and harassment upon Defendant Church, subjected Defendant Church to the deprivation by Plaintiffs, under color of law, and the customs and usages of the State of Ohio, of rights, privileges, and immunities secured to Defendant Church by the Constitution and laws of the United States, in particular Defendant Church's rights to the freedom of religion and association as guaranteed under the First Amendment to said United States Constitution, Defendant Church's rights not to be deprived of liberty without due process of law as guaranteed to Defendant Church by the Fourteenth Amendment to said Constitution, Defendant Church's rights reserved and retained under the Ninth and Tenth Amendments to said Constitution and Defendant church's right to the equal protection of the laws guaranteed under the Fourteenth Amendment of said Constitution.

In June of 1979, the parties filed respective motions for summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure. APP. 30. On September 10, 1981, based upon depositions, affidavits, and exhibits, the lower court granted summary judgment in favor of Respondents and dismissed Petitioner's counterclaim. APP. 16.

On December 22, 1982, the Court of Appeals for the Eighth Judicial District affirmed the lower court's decree as follows:

> There is therefore contained in the record no evidence which would indicate that the code violations do not exist, that the requirements set forth in the code provisions do not bear a substantial relationship to the compelling state interest of protecting the health and safety of those using the church, or that the enforcement of the code provisions was arbitrary or capricious or was such that an inference could be drawn that defendant was being harrassed or discriminated against because of its religious affiliation. APP. 13.

The Court of Appeals also states:

> We conclude, therefore, that the record demonstrates that an effective, though appealable, adjudication order was issued to the defendant upon disapproval of his building plans and, therefore, the subsequent initiation of court action under R. C. 3781.15 was proper. APP. 11.

Petitioner filed a notice of appeal to the Supreme Court of Ohio. On April 13, 1983, considering Petitioner's memorandum in support of jurisdiction as a motion for an order directing the court of appeals to certify its Record, the Supreme Court overruled same. APP. 1. While the Order of the Supreme Court of Ohio did not rule on the merits of the case at bar, Petitioner's memorandum in support addressed the issues set forth in the within petition as follows:

PROPOSITION OF LAW NO. 1

WHEN SUBJECT MATTER JURICDICTION OF A COURT IS DEPENDENT UPON THE FULFILLMENT OF CERTAIN STATUTORY REQUIREMENTS, THE PLEADING DEMONSTRATING SUCH FULFILLMENT MUST BE STRICTLY CONSTRUED AND WILL NOT BE EXTENDED BEYOND ITS CLEAR EXPRESSION.

• • •

PROPOSITION OF LAW NO. 3

IN ORDER THAT HE MIGHT EXERCISE HIS RIGHT TO APPEAL IF HE SO CHOOSES, A BUILDING PERMIT APPLICANT MUST BE NOTIFIED OF THE ISSUANCE OF AN ADJUDICATION ORDER BY THE ISSUING AGENCY.

• • •

PROPOSITION OF LAW NO. 4

WHEN AN ACTION AGAINST A MUNICIPAL CORPORATION AND CERTAIN OF ITS OFFICIALS IS BASED UPON 42 U. S. C. SEC. 1983, THEN THE LATTERS' RAISING OF THE DEFENSE OF QUALIFIED IMMUNITY PRESENTS MATERIAL FACT ISSUES WHICH CANNOT BE APPROPRIATELY ADDRESSED UNDER PRETRIAL MOTION PROCEDURE.

It is from the ruling of the Court of Appeals for the Eighth Judicial District, Cuyahoga County, Ohio, that Petitioner prays a writ of certiorari issue.

REASONS FOR GRANTING WRIT

1. Certiorari should be granted in order to determine the appropriateness of disposing of a claim based upon 42 U. S. C. Sec. 1983 by way of pre-trial motion procedures when the defense of qualified immunity is raised.

The very nature of the qualified immunity defense makes it clear, Solon Baptist Temple submits, that the lower court herein erred in granting City's Motion for summary judgment. When, as in this case, such a defense is raised, questions of fact arise which must be addressed by the trier of fact. *Taylor v. Perini*, 503 F. 2d 899 (6th Cir. 1974). *Taylor*, describes the treatment to be accorded the defense of executive immunity:

> Thus, in order to determine whether a defendant is entitled to official immunity from liability for damages, there must be some finding as to the scope of his discretion, the existence of reasonable grounds for the propriety of the official's actions, and the exercise of good faith in the performance of his duties. *Id.*

In the case at bar, the lower court erred in failing to make specific findings with respect to the scope of discretion of Korkowski and Zugan in their official duties, the existence of reasonable grounds for the propriety of their actions, and/or the exercise of good faith in the performance of their duties, as all relate to Solon Baptist, such findings being essential in the context of the Church's § 1983 Counterclaim. The resolution of a § 1983 claim by way of summary judgment has been found to be inappropriate in several jurisdictions. *Sisters of Prov. of St. Mary of The Woods v. City of Evanston,* 335 F. Supp. 396 (N. D. Ill. 1971); *see also, Thomas v. Yourglove,* 545 F. 2d 1171 (9th Cir. 1976) (a defense of official immunity raises issues of fact which cannot be resolved at the pleading stage); *accord, Gomez v. Pima County,* 426 F. Supp. 816 (D. Ariz. 1976) (the issue of immunity raises an issue of fact to be resolved at trial). In light of the above, it was error for the lower court to dismiss Solon Baptist's Section 1983 Counterclaim in summary fashion. A trial on the merits is essential to consider with specificity the immunity defenses by the city officials, and also the issue of whether Respondents did indeed under color of state law deprive Solon Baptist (and its members) of the free exercise of religion as guaranteed by the First Amendment to the U. S. Constitution. *Cantwell v. Connecticut,* 310 U. S. 296 (1940) (First Amendment is applicable to the States by way of the Fourteenth Amendment).

2. Certiorari should be granted in order to determine whether a pleading which must demonstrate fulfillment of certain statutory requirements is to be strictly construed and not extended beyond its clear expression when subject matter jurisdiction is dependent upon such fulfillment.

In the case of *Morrison v. Steiner*, 32 Ohio St. 2d 86, 87 (1972), the Ohio Supreme Court defined subject matter jurisdiction as the "power (of the court) to hear and decide a case upon its merits." (parenthetical material added). In the cause herein, the lower court could obtain such jurisdiction only upon the fulfillment by the City of Solon of the pertinent requirements of Sec. 3781.031 of the Ohio Revised Code as follows:

> Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781 and 3791 of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop-work order as provided herein.

In its attempt to satisfy O.R.C. Sec. 3781.031, the Respondents plead at paragraph No. 11 of their Complaint that "plaintiff Korkowski issued and posted on the building a written stop-work order to the defendant."

In its response in opposition to the Respondents' motion for summary judgment, Solon Baptist raised the issue of whether or not a stop-work order of any nature was ever issued to it. Ultimately, summary judgment was granted. Although the Eighth District Court of Appeals affirmed that decision, it also noted:

> . . . (D)epositional evidence does suggest the existence of a genuine issue of fact (though in the opinion of

> the reviewing court not "material") as to whether plaintiffs issued a stop work order to defendant prior to the initiation of court action against the defendant. (parenthetical material added).

APP. 8. Nevertheless the Court of Appeals further determined that "the record demonstrates that an adjudication order was issued. . . ." *Id.* For the reasons given below, Solon Baptist submits tht such latter determination is insufficient to confer subject matter jurisdiction upon the lower court herein. None of the Respondents pleadings below (i.e., the complaint and summary judgment motion) make any reference whatsoever to the issuance of an adjudication order against the Church.

It has been previously recognized that when the matter of jurisdiction "is dependent upon the language of a pleading, the pleading will be strictly construed, and its scope will not be extended beyond its clear expression." *Electric Railway Company v. Express Company,* 105 Ohio St. 331, 345 (1922); *see also, Koellsch v. Calvary Cemetery Assoc.,* 11 Ohio L. Abs. 341, 342 (1931); and *Abrams and Clark,* 76 Ohio L. Abs. 49, 51 (1957).

Thus, pursuant to O.R.C. Sec. 3781.031, the Respondents were under a duty to plead the existence of either an "adjudication order" or a "stop-work order" against Solon Baptist before the lower court could issue any decision implementing an enforcement of Chapters 3781 and 3791 of the Code. In this regard, only the issuance of a "written stop-work order" was alleged, and the existence of such order is a question of fact as determined by the reviewing court. APP. 8. A strict construction of the City's complaint reveals no reference to an adjudication order nor a "clear expression" thereof in its other averments. *Electric Railway, supra.*

Solon Baptist is aware that Rule 8(F) of the Ohio Rules of Civil Procedure calls for a construction of pleadings "so as to do substantial justice." APP. 32. However, it submits that such rule must be read in conjunction with Rule 82 which states:

> These rules shall not be construed to extend or limit the jurisdiction of the courts of this state.

In light of the above, the Church believes the courts below erred in allowing subject matter jurisdiction. At the very least, a question of material fact exists as to whether a "written stop-work order" was issued so as to perfect jurisdiction. *See also, Village of Burton v. Burton Century Development Corp.*, Court of Appeals of Ohio, Eleventh Dist., Case No. 920 (decided, Sept. 30, 1981) (stop-work order against an existing structure was insufficient to confer jurisdiction on the court.) APP. 34.

3. Certiorari should be granted in order to determine the right of a building permit applicant to notification by the issuing agency of an adverse adjudication order in order that he may, if he so chooses, avail himself of any administrative appeal procedures.

It was not until well into the proceedings below that the Respondents even hinted by way of briefs at the possible existence of an adjudication order against Solon Baptist. The trial court never ruled on the existence of same. APP. 16. However, the reviewing court states:

> We conclude, . . . , that the record demonstrates that an effective, though appealable, adjudication order was issued to the defendant upon disapproval of his building plans and, therefore, the subsequent initiation of court action under R. C. 3781.15 was proper APP. 11.

Even if it is assumed, *arguendo*, that such an adjudication order was indeed issued and that pursuant to O.R.C. Sec. 119.06(C) it could be so issued without the need of a hearing, Solon Baptist, as a building permit applicant, surely has the right to receive notification of such issuance. Thereupon, the Church could have, if it so chose, exercised its right of appeal under the provisions of O.R.C. Sec. 119.12. APP. 20. Clarification of the duties imposed on an administrative agency issuing an order is requested.

Religious organizations such as Solon Baptist which are afforded the First Amendment umbrella of guarantees and protections, are considered in the context of a higher priority or "preferred position" when balancing conflicting rights and interests of church and state. *Marsh v. State of Alabama,* 326 U. S. 501, 509 (1945); *Murdock v. Pennsylvania,* 319 U. S. 105, 115 (1943). In failing, among other things to utilize proper administerial procedures, the Respondents have run roughshod over the Church's constitutionally preferred status. The Petitioner does not seek deference but rather constitutionally required accommodation.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF OHIO
1983 Term

To wit April 13, 1983

No. 83-293

THE STATE OF OHIO,
City of Columbus,
The City of Solon, et al.,
Appellees,

vs.

Solon Baptist Temple, Inc.,
Appellant.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
for Cuyahoga County
To Certify Its Record

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Gibbs & Craze.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

THE SUPREME COURT OF OHIO
1983 Term

To wit: April 13, 1983

No. 83-293

THE STATE OF OHIO,
City of Columbus,

The City of Solon, et al.,

Appellees,

vs.

Solon Baptist Temple, Inc.,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Cuyahoga County

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX B

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

No. 44425

APPEAL FROM COMMON PLEAS COURT

No. 989,015

THE CITY OF SOLON, ET AL.,
Appellees,

vs.

SOLON BAPTIST TEMPLE, INC.,
Appellant.

JOURNAL ENTRY AND OPINION

Date December 23, 1982

PARRINO, J.:

This cause came on to be heard upon the pleadings and the.....transcript of the evidence and the record in the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

Solon Baptist Temple, Inc., defendant-appellant, appeals the entry of summary judgment on both a complaint and a counterclaim in favor of the City of Solon, Solon Building Commissioner Arthur D. Korkowski, and Solon Fire Inspector Frank G. Zugan, plaintiffs-appellee.

On September 8, 1978, plaintiffs filed a complaint seeking to have defendant's church building declared a public nuisance because of the alleged existence of building and fire code violations and to have its use as a place of public assembly enjoined.

Defendant answered, asserting as an affirmative defense the failure of plaintiffs to comply with R. C. 3781.031, which sets forth the requirement that a stop order or an adjudication order be issued by any agency before it attempts to enforce, by any civil or criminal remedy, the provisions of Chapters 3781 or 3791 of the Revised Code or any rules or regulations adopted pursuant thereto.

Defendant also counterclaimed, alleging as follows:

> "Plaintiffs have systematically, by infliction of extreme duress and harassment upon Defendant Church, subjected Defendant church to the deprivation by Plaintiffs, under color of law, and the customs and usages of the State of Ohio, of rights, privileges, and immunities secured to Defendant church by the Constitution and laws of the United States, in particular Defendant church's rights to the freedom of religion and association as guaranteed under the First Amendment to said United States Constitution, Defendant church's rights not to be deprived of liberty without due process of law as guaranteed to Defendant church by the Fourteenth Amendment to said Constitution, Defendant church's rights reserved and retained under the Ninth and Tenth Amendments to said Constitution and Defendant church's right to the equal protection of the laws guaranteed under the Fourteenth Amendment of said Constitution."

Defendant cited 42 U. S. C. § 1983 in support of its counterclaim.

On June 27, 1979, defendant moved for summary judgment on plaintiffs' complaint, contending that neither a

stop order nor an adjudication order had been issued to defendant.

Plaintiffs opposed the motion with a brief supported by reports of an inspection of the church premises undertaken by order of the court on August 10, 1979, indicating the existence of numerous building and fire code violations. Plaintiffs also moved for summary judgment on plaintiffs' complaint and defendant's counterclaim.

On February 13, 1980, defendant moved for leave to file an amended counterclaim to name the mayor and the members of City Council of the City of Solon as new parties-defendant in the action.

By journal entry of September 17, 1981, the trial court granted summary judgment in favor of plaintiffs on their complaint and on defendant's counterclaim and enjoined defendant from using the church premises as a place of public assembly until such time as the building is brought into compliance with the Ohio Building Code and Fire Prevention Code.[1]

---

[1]The judgment entry indicates that the trial court had before it for its consideration in ruling on the motion for summary judgment *inter alia* "the depositions of Marion Wojnarowski, Arthur D. Korkowski, and Frank G. Zugan."

However, while complete depositions of Mr. Korkowski and Mr. Zugan were filed and are a part of the record on appeal, only a partial deposition of the Reverend Wojnarowski, attached to defendant's motion for summary judgment, is of record. The docket sheet, while it indicates the filing of the Zugan and Korkowski depositions, includes no such entry with respect to the deposition of Reverend Wojnarowski.

We shall therefore assume that the trial court had before it, when ruling on the motion, only the partial rather than the complete deposition of Reverend Wojnarowski.

Defendant assigns four errors on appeal. Because they can be more conveniently treated together, we shall consider defendant's first three assignments of error separately from the fourth.

> "1. Upon consideration of the evidence in support of and in opposition to the City of Solon's Motion for Summary Judgment, the lower court erred in permanently enjoining Solon Baptist, its officers, agents, employees, successors and assigns, from utilizing its structure located at 7669 SOM Center Road as a place of public assembly until such time as said structure is brought into compliance with the Ohio Building Code and Fire Prevention Code as administered by appellee.
>
> "2. Upon consideration of the evidence in support of and in opposition to the City of Solon's Motion for Summary Judgment, the lower court erred in dismissing Solon Baptist's Counterclaim with prejudice."
>
> "3. In granting the City of Solon's Motion for Summary Judgment, the lower court erred in finding that there is no genuine issue as to any material fact in this case and that appellee is entitled to judgment as a matter of law."

In his arguments in support of these assignments of error, defendant in fact raises only two issues.

Defendant first contends that the trial court erred in granting summary judgment in favor of plaintiffs on their claim because there exists a genuine issue of material fact as to whether a stop order or an adjudication order had been issued to the defendant.

R. C. 3781.031 requires either of such orders to have been issued before an attempt is made to enforce the provisions of Chapters 3781 or 3791:

"3781.031 Issuance of adjudication orders and stop work orders.

"Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein."

Plaintiff Korkowski gave testimony by way of deposition that in July of 1978 he placed a red tag on the door knob of the front door of the church building (Dep. of Korkowski, p. 44). He also stated that a red tag, in his opinion, is the same as a stop work order (Dep. of Korkowski, p. 44) and that he wrote on the tag that work on the premises should be discontinued until a building permit was obtained (Dep. of Korkowski, p. 49). He admitted that the Building Department has a standard stop work order form but he did not use one on the day he left the red tag because he did not have one available.

Reverend Wojnarowski gave testimony by way of deposition as follows:

"Q. During the period of time somewhere in that neighborhood, those dates, Tuesday, Wednesday of Thursday, did you ever have occasion to find a stop work order placed on the house?

"A. No, sir. We had no indication at all that there was any kind of a stop work order, verbal or written, issued to us. We never found anything, there was nothing on the building. No one ever received anything, nobody saw anything." (Dep. of Wojnarowski, pp. 27-28).

He also stated that a "no occupancy" sticker was placed on the church building.

This depositional evidence does suggest the existence of a genuine issue of fact as to whether plaintiffs issued a stop work order to defendant prior to the initiation of court action against the defendant.

However, if the record demonstrates that an adjudication order was issued to the defendant, the question of whether a stop work order was issued is not a "material" factual issue within the meaning of Civ. R. 56(C) because a finding in favor of the defendant on that issue would not preclude a summary judgment in plaintiffs' favor.

R. C. 3791.04 prohibits the owner of a building used as a place of assembly from proceeding with the construction or alteration of such building until plans or drawings for the construction or alteration thereof are submitted for approval to the municipal building department having jurisdiction over the building. Such approval shall not be given unless the building, as altered, would meet the requirements set forth in Chapters 3781 and 3791 of the Revised Code and any rule made pursuant thereto.

It is further provided under R. C. 3791.04 as follows:

> "The approval of plans and specifications . . . under this section is a 'license' and the failure to approve such plans or specifications as submitted . . . within thirty days after the plans or specifications are filed . . . or the disapproval of such plans and specifications. . . . is 'an adjudication order denying the issuance of a license' requiring an 'adjudication hearing' as provided by sections 119.07 to 119.13 of the Revised Code and as modified by sections 3781.031 (3781.03.1) and 3781.19 of the Revised Code. An adjudication order denying the issuance of a license shall specify the reasons for such denial."

R. C. 3781.031 also sets forth requirements of an adjudication order in the following terms:

> "Every adjudication order shall specify what applicances, site preparations, additions, or alterations to structures, plans, materials, assemblages or procedures are necessary for the same to comply with Chapters 3781. and 3791. of the Revised Code."

As these statutes indicate, the disapproval of building plans and specifications constitutes an adjudication order. To be effective, such an order must specify the reasons for the disapproval and indicate what plans and alterations are necessary for the building to be in compliance with Chapters 3781 and 3791.

The record demonstrates that defendant's building plans, submitted in support of his application for a building permit, were disapproved by plaintiff Korkowski and that defendant was given a list of building and fire code violations which had to be corrected to bring the church premises into compliance with code provisions (Dep. Zugan, p. 10; Dep. Korkowski, pp. 18, 23, 35, 37-39, 49, 60-61, 65; Exhibits B, C, and D attached to complaint and referred to in depositions).

Defendant, however, contends that it was not afforded an "adjudication hearing" as required by R. C. 3791.04.

R. C. 3781.19 makes clear that the "adjudication hearing" referred to in R. C. 3791.04 is that granted before the Board of Building Appeals to which defendant may appeal the disapproval of his building plans. R. C. 3781.19 pertinently provides:

> "The board of building appeals is the agency within the meaning of sections 119.09 to 119.13 of the Revised Code, which shall conduct the adjudication hearing referred to in such sections and required by section 3781.031 (3781.03.1) of the Revised Code."

Therefore, defendant had a right to appeal the disapproval of his plans but the initial disapproval was itself an effective "adjudication order" pending appeal.

This conclusion is reinforced by the language of R. C. 119.06:

> "No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13, inclusive, of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order *except in those situations where this section provides otherwise.*
>
> "The following adjudication orders shall be effective without a hearing:
>
> • • •
>
> "(C) *Orders or decisions of an authority within an agency if* the rules of the agency or *the statutes pertaining to such agency specifically give a right of appeal* to a higher authority within such agency or *to another agency and also give the appellant a right to a hearing on such appeal.*" (Emphasis added).

Since defendant does have a right to appeal to another agency, *i.e.*, the Board of Building Appeals, and a right to a hearing on such appeal, the adjudication order is effective without a hearing.

The following language of R. C. 3781.031 further supports this conclusion:

> "*Before any department or agency of* the state or *any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto* by any remedy, civil or criminal, *it shall issue an adjudication order* within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein." (Emphasis added).

It is implicit in the language of this statutory provision that a municipal building department may itself issue an adjudication order which would counter the argument that the only adjudication order to which reference is made in Chapters 3781 and 3791 is that issued by the Board of Building Appeals after a hearing before that body.

To hold that the disapproval of plans by a municipal building commission is not an adjudication order would permit the building permit applicant to control the municipality's ability to initiate court action simply by failing to appeal the disapproval of its plans.

Furthermore, we note that a permit applicant may, if he so chooses, in addition to his right to appeal to the board of building appeals, request a hearing before the municipal building department. This option is provided for under R. C. 119.06:

> "Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license."

We conclude, therefore, that the record demonstrates that an effective, though appealable, adjudication order was issued to the defendant upon disapproval of his building plans and, therefore, the subsequent initiation of court action under R. C. 3781.15 was proper.

Finally, plaintiffs also base their claim for judical relief upon R. C. 3737.44.

This provision, having become effective on July 1, 1979, subsequent to the initiation of the present suit, is, as defendant contends, inapplicable to this action.[2]

The second issue raised by defendant in support of its first three assignments of error is whether the trial court erred in granting summary judgment to plaintiffs on defendant's counterclaim which was based upon 42 U. S. C. § 1983:

"§ 1983. Civil action for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

As the excerpt from defendant's counterclaim set forth at the beginning of this opinion indicates, defendant alleges, in a conclusory fashion, the violation of a number of constitutional rights.

Assuming *arguendo* that defendant, as a corporation, has standing to assert on its own behalf, the violation of individual constitutional rights such as freedom of religion and association and to seek recovery for alleged infliction

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[2]We do not address the issue of whether R. C. 3737.44 may be given retroactive effect under the theory that it is remedial in nature since plaintiffs did not make such an argument nor cite authority in support thereof.

of physical and mental duress upon the Reverend Wojnarowski, not a party to this action, issues which we specifically do not decide, still we find defendant's contention to be without merit.

The record contains unrebutted documentary evidence of the numerous building and fire code violations on the church premises.

On the other hand, defendant submitted no evidentiary material in support of its counterclaim. There is therefore contained in the record no evidence which would indicate that the code violations do not exist, that the requirements set forth in the code provisions do not bear a substantial relationship to the compelling state interest of protecting the health and safety of those using the church, or that the enforcement of the code provisions was arbitrary or capricious or was such that an inference could be drawn that defendant was being harassed or discriminated against because of its religious affilation.

The second issue raised by the defendant is therefore devoid of merit.

> "4. The lower court erred in failing to rule on Solon Baptist's Motion for Leave to Allow the filing of an Amended Counterclaim."'

This assignment of error is not well taken.

By entering judgment in favor of the plaintiffs and dismissing defendant's counterclaim, the trial court implicitly overruled defendant's motion for leave to file an amended counterclaim. *See Lichtenstein v. L. Fish Furniture Co.* (Ill. S. Ct., 1916), 272 Ill. 191; Ill. N. E. 729, 731 (where court proceeds to trial of an action on counts

against which demurrer was filed, express overruling of demurrer is unnecessary); *Re Automobile Liability Ins. Rates* (Vt. S. Ct. 1969), 128 Vt. 73, 258 A. 2d 826, 830 (where court proceeded to dispose of merits of case without oral argument, court impliedly overruled motion for oral argument); *see also Hayes v. Smith* (1900), 62 Ohio St. 161 (where court fails to rule on objection, it will be presumed to have overruled objection).

Furthermore, although defendant does not expressly argue the point, we do not believe that the trial court erred in overruling defendant's motion for leave to amend.

While defendant filed a motion for leave to file an amended counterclaim on February 13, 1980, that motion referred to the proposed amended counterclaim as "Exhibit A". However, no such Exhibit A was found attached to the motion. Defendant did file a document entitled "Defendant Church's Amended Complaint." However, that was filed on October 22, 1979, prior to the filing of the motion and therefore out-of-rule. Moreover, it does not, in its caption, list the proposed additional parties-defendant set forth in defendant's motion.

Given the confusing manner in which defendant raised the issue and the failure of defendant to submit evidence in the summary judgment proceeding in support of its counterclaim as originally drawn, the court cannot be said to have abused its discretion in overruling defendant's motion for leave to amend the counterclaim to name additional parties-defendant and pray for additional damages.

Judgment affirmed.

It is ordered that appellee(s) recover of appellant(s) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P. J.,
JACKSON, J., CONCUR

/s/ Thomas J. Parrino,
Judge

THOMAS J. PARRINO

For plaintiff-appellees: Charles T. Riehl
and Thomas G. Longo

For defendant-appellant: Charles E. Craze

N. B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

APPENDIX C

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Case No. 78-989015

CITY OF SOLON, et al.

Plaintiffs

vs.

SOLON BAPTIST TEMPLE, INC.

Defendant

(Filed September 11, 1981)

JOURNAL ENTRY

This matter was heard on Defendant's Motion for Summary Judgment and supporting Brief, and the Plaintiffs' Cross-Motion for Summary Judgment; Brief in Support for Cross-Motion for Summary Judgment; and Brief in Opposition to Motion for Summary Judgment filed by Defendant. Upon consideration of the pleadings on file, the Motions and Briefs, the Affidavits attached thereto, and the depositions of Marion Wojnarowski, Arthur D. Korkowski, and Frank G. Zugan, together with Exhibits attached thereto, the Court finds that there is no genuine issue as to any material fact in this case and that the Plaintiffs are entitled to judgment as a matter of law. Accordingly, this Court concludes that, pursuant to Ohio Civil Rule 56, summary judgment should be granted for Plaintiffs on their claim against the Defendant and summary judgment should be granted for the Plaintiffs denying the Defendant's Counterclaim.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED:

(1) That judgment is hereby rendered in favor of Plaintiffs on the claims asserted in the Complaint against the Defendant and the Defendant, its officers, agents, employees, successors and assigns, be and are hereby permanently enjoined from utilizing its structure located at 7669 SOM Center Road, Solon, Ohio, as a place of public assembly until such time as said structure is brought into compliance with the Ohio Building Code and Fire Prevention Code as administered by the Plaintiffs.

(2) That judgment is hereby rendered in favor of Plaintiffs on the claims asserted in the Defendant's Counterclaim and said Counterclaim be, and the same hereby is, dismissed with prejudice.

(3) That the Defendant bear the costs of this action.

IT IS SO ORDERED.

/s/ James J. McGettrick,
Judge.

APPENDIX D

42 U. S. C. § 1983. *Civil action for deprivation of rights'.*

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceed-Act of Congress applicable exclusively to the District of ing for redress. For the purposes of this section, any Columbia shall be considered to be a statute of the District of Columbia. (As amended Dec. 29, 1979, P. L. 96-170, § 1, 93 Stat. 1284).

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AGENCY POWERS

119.06 *Adjudication order of agency valid and effective; hearings; periodic registration of licenses.*

No adjudication order of an agency shall be valid unless said agency is specifically authorized by law to make such order.

No adjudication order shall be valid unless an opportunity for a hearing is afforded in accordance with sections 119.01 to 119.13 of the Revised Code. Such opportunity for a hearing shall be given before making the adjudication order except in those situations where this section provides otherwise.

The following adjudication orders shall be effective without a hearing:

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency or to another agency and also give the appellant a right to a hearing on such appeal.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license.

When periodic registration of licenses is required by law the agency shall afford a hearing upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

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119.12 *Appeal by party adversely affected.*

Any party adversely affected by any order of an agency issued pursuant to an adjudication denying an applicant admission to an examination, or denying the issuance or renewal of a license, registration of a licensee, or revoking or suspending a license, may appeal from the order of the agency to the court of common pleas of the county in which the place of business of the licensee is located or the county in which the licensee is a resident, provided that appeals from decisions of the liquor control commission may be to the court of common pleas of Franklin county. If any such party is not a resident of and has no place of business in Ohio, he may appeal to the court of common pleas of Franklin county.

Any party adversely affected by any order of an agency issued pursuant to any other adjudication may

appeal to the court of common pleas of Franklin county, except that appeals from orders of the fire marshal, issued under Chapter 3737, of the Revised Code, may be to the court of common pleas of the county in which the building of the aggrieved person is located.

This section does not apply to appeals from the department of taxation or the department of tax equalization.

Any party desiring to appeal shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of his appeal. A copy of such notice of appeal shall also be filed by appellant with the court. Unless otherwise provided by law relating to a particular agency, such notices of appeal shall be filed within fifteen days after the mailing of the notice of the agency's order as provided in this section.

The filing of a notice of appeal shall not automatically operate as a suspension of the order of an agency. If it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal, the court may grant a suspension and fix its terms. In the event an appeal is taken from the judgment of the court and the court has previously granted a suspension of the agency's order as provided in this section such suspension of the agency's order shall not be vacated and shall be given full force and effect until the matter is finally adjudicated. No renewal of a license or permit shall be denied by reason of such suspended order during the period of the appeal from the decision of the court of common pleas. In the case of an appeal from the state medical board, the

court may grant a suspension and fix its terms if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order. This provision shall not be construed to limit the factors the court may consider in determining whether to suspend an order of any other agency pending determination of an appeal.

The final order of adjudication may apply to any renewal of a license or permit which has been granted during the period of the appeal.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the liquor control commission suspending or revoking a permit issued under Chapter 4303, of the Revised Code shall terminate not more than fifteen months after the date of the filing of notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Notwithstanding any other provision of this section, any order issued by a court of common pleas suspending the effect of an order of the state medical board that limits, revokes, suspends, places on probation, or refuses to register or reinstate a certificate issued by the board or reprimands the holder of such a certificate shall terminate not more than fifteen months after the date of the filing of notice of appeal in the court of common pleas, even if the matter has not been finally adjudicated within that time.

Within thirty days after receipt of notice of appeal from an order in any case wherein a hearing is required by sections 119.01 to 119.13 of the Revised Code, the agency shall prepare and certify to the court a complete record of the proceedings in the case. Failure of the agency to comply within the time allowed shall, upon motion, cause the court to enter a finding in favor of the party adversely affected. Additional time, however, may be granted by the court, not to exceed thirty days, when it is shown that the agency has made substantial effort to comply. Such record shall be prepared and transcribed and the expense thereof shall be taxed as a part of the costs on the appeal. The appellant must provide security for costs satisfactory to the court of common pleas. Upon demand by any interested party, the agency shall furnish at the cost of the party requesting it a copy of the stenographic report of testimony offered and evidence submitted at any hearing and a copy of the complete record.

Unless otherwise provided by law, in the hearing of the appeal the court is confined to the record as certified to it by the agency. Unless otherwise provided by law, the court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the agency.

The court shall conduct a hearing on such appeal and shall give preference to all proceedings under sections 119.01 to 119.13 of the Revised Code, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. The hearing in the court of common pleas shall proceed as in the trial of a civil ac-

tion, and the court shall determine the rights of the parties in accordance with the laws applicable to such action. At such hearing counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence.

The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law. The judgment of the court shall be final and conclusive unless reversed, vacated, or modified on appeal. Such appeals may be taken either by the party or the agency and shall proceed as in the case of appeals in civil actions as provided in sections 2505.01 to 2505.45 of the Revised Code. Such appeal by the agency shall be taken on questions of law relating to the constitutionality, construction, or interpretation of statutes and rules of the agency, and in such appeal the court may also review and determine the correctness of the judgment of the court of common pleas that the order of the agency is not supported by any reliable, probative, and substantial evidence in the entire record. Such appeals may be taken regardless of the fact that a proceeding was pending prior to the amendment of this section expressly authorizing such appeals, provided such appeals are perfected by the filing of notice

of appeal within the time prescribed by section 2505.07 of the Revised Code.

The court shall certify its judgment to such agency or take such other action necessary to give its judgment effect.

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3781.031 *Issuance of adjudication orders and stop work orders*

Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781. and 3791. of the Revised Code or any rules or regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop work order as provided herein.

Any person charged with the duty of enforcing Chapters 3781. and 3791. of the Revised Code or the rules or regulations adopted pursuant thereto may issue a stop work order whenever he finds, after inspection, that the site preparations or structure to be constructed, or in the case of an industrialized unit, the installation of the unit, or that the use of an appliance, material, assemblage or manufactured product does not comply with the provisions of Chapters 3781. and 3791. of the Revised Code or the rules or regulations adopted pursuant thereto. The effect of such an order shall be limited to the matter specified therein.

Every adjudication order shall specify what appliances, site preparations, additions, or alterations to struc-

tures, plans, materials, assemblages or procedures are necessary for the same to comply with Chapters 3781. and 3791. of the Revised Code.

Upon the issuance of any order provided for herein, the person receiving such order shall cease work upon the site preparations or structure to be constructed, or in the case of an industrialized unit, the installation of the unit, or shall cease using the appliance, materials, assemblages or manufactured produce identified in the order until such time as the appeal provided for in accordance with the provisions of section 3781.19 of the Revised Code, and all appeals from such hearing have been completed, or the order issued herein has been released.

Notwithstanding the provisions of Chapter 119. of the Revised Code relating to adjudication hearings and the proceedings thereon, a stenographic or mechanical record of the testimony and other evidence submitted shall be taken at the expense of the agency; a party adversely affected by an order issued following such adjudication hearing may appeal to the court of common pleas of the county in which he is a resident or in which the premises affected by such order is located; the court in such case shall not be confined to the record as certified to it by the agency but any party may produce additional evidence and the court shall hear the matter upon such record and such additional evidence as is introduced by any party; and the court shall not affirm the order of the agency unless the preponderance of the evidence before it supports the reasonableness and lawfulness of such order and of any rule or regulation of the board of building standards upon which the order of the agency is based in its application to the particular set of facts or circumstances involved in the appeal.

Failure to cease work after receipt of a stop work order is hereby declared a public nuisance.

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3781.15 *Injunction proceedings*

The construction, use, or occupation of any building which is declared by sections 3781.06 to 3781.18, inclusive, section 3781.031, and section 3791.04 of the Revised Code, to be a public nuisance may be enjoined in a proceeding instituted in the name of any department or officer mentioned in section 3781.03 of the Revised Code in the court of common pleas of the county in which said building is or will be situated.

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Rule 8

GENERAL RULES OF PLEADING

(A) *Claims for relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(B) *Defenses; form of denials.* A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the

averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(C) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(D) *Effect of failure to deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(E) *Pleading to be concise and direct; consistency.*

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(F) *Construction of pleadings.* All pleadings shall be so construed as to do substantial justice.

(G) *Pleadings shall not be read or submitted.* Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

(H) *Disclosure of minority or incompetency.* Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

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Rule 56

SUMMARY JUDGMENT

(A) *For party seeking affirmative relief.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) *For defending party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) *Motion and proceedings thereon.* The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) *Case not fully adjudicated upon motion.* If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(E) *Form of affidavits; further testimony; defense required.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the mat-

ters stated therein. Sworn or certified copies of all papers or parts thereof referred to an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(F) *When affidavits are unavailable.* Should it appear from the affidavits of a party opposing the motion for summary judgment that he cannot for sufficient reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) *Affidavits made in bad faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Amended July 1, 1976.

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TITLE X. GENERAL PROVISIONS

Rule 82

JURISDICTION UNAFFECTED

These rules shall not be construed to extend or limit the jurisdiction of the courts of this state.

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APPENDIX E

COURT OF APPEALS OF OHIO, ELEVENTH DISTRICT

COUNTY OF GEAUGA

COURT OF APPEALS CASE NO. 920

VILLAGE OF BURTON, ET AL.,

Plaintiff-Appellees,

vs.

BURTON CENTURY DEVELOPMENT CORPORATION,

Defendant-Appellant.

JUDGES:

HON. EDWIN T. HOFSTETTER, P.J.
HON. ROBERT E. COOK, J.
HON. ALFRED E. DAHLING, J.

OPINION

(filed September 30, 1981)

APPEARANCES:

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Counsel for Appellant

DAHLING, J.,

This is an appeal from a judgment of the Court of Common Pleas, Geauga County, wherein the court granted a permanent injunction which enjoined the defendant-appellant from operating a nightclub or having organized entertainment.

The defendant has presented the following Assignments of Error for review:

I. THE COURT ERRED IN THAT THE COURT LACKED JURISDICTION WHERE PLAINTIFF DID NOT EXHAUST ITS ADMINISTRATIVE REMEDIES, WHICH WERE EXCLUSIVE.

II. THE COURT ERRED IN ISSUING AN INJUNCTION WHERE EVIDENCE IS CONFLICTING, CONFUSING AND NOT CLEAR AND CONVINCING, AND THEREFORE AGAINST THE WEIGHT OF THE EVIDENCE.

The first Assignment of Error is with merit, and the second assignment is overruled.

First Assignment of Error

The appellant claims that the court lacked jurisdiction to enter the injunctions. This contention is based on R. C. 3781.031, which states in pertinent part:

> "Before any department or agency of the state or any political subdivision attempts to enforce Chapters 3781 and 3791 of the Revised Code or any rules and regulations adopted pursuant thereto, by any remedy, civil or criminal, it shall issue an adjudication order within the meaning of sections 119.06 to 119.13, inclusive, of the Revised Code, or a stop-work order as provided herein. . . ."

Appellees admit that they did not send appellant an adjudication order. Instead, the appellees argue that the letter sent prior to this action constituted a stop-work order. "Stop-work order" is not defined in the Revised Code. The above statute states that a stop-work order may issue when:

> "Any person charged with the duty of enforcing Chapters 3781 and 3791 of the Revised Code or the rules

> or regulations adopted pursuant thereto . . . finds, after inspection, that the site preparations or structure to be constructed, or in the case of an industrialized unit, the installation of the unit, or that the use of an appliance, material, assemblage or manufactured produce does not comply with the provisions of Chapters 3781 and 3791 of the Revised Code or the rules or regulations adopted pursuant thereto. . . ."

The statute goes on to state that work must cease immediately upon receiving the order.

The appellant maintains that "stop-work" orders only apply to buildings being constructed, not those already standing and in operation. Appellees contend such an order can be issued to an existing structure.

In the instant cause, the injunction has to do with the inadequacy of the Inn's structure for use as a night-club. Only adjudication orders can specify that "alterations to structures" need to be done in order to comply with the rules and regulations. A stop-work order will not suffice. Therefore, the trial court was without jurisdiction to consider this injunction before a proper adjudication order had issued.

This injunction remedy is a condition subsequent; that is, it is only available after R. C. 3781.031 has been complied with and the builder/operator fails to obey the order. The purpose of the statute is to give the parties the ability to try their case before a board of experts. This purpose is destroyed if the agency charged with the enforcement of the rules can immediately obtain the desired relief in court. The court had no jurisdiction to issue the injunction.

Second Assignment of Error

The second Assignment of Error is without merit since there is some evidence to support the judgment.

Judgment reversed and final judgment is entered for defendant.

ALFRED E. DAHLING, Judge

HOFSTETTER, P. J., Concurs in judgment only

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